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In the
Supreme Court of the United States

October Term, 1972

No. 72-1005

SIERRA CLUB AND CITIZENS FOR
CLEAN AIR AND WATER,
Petitioners

v.

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR, ET AL.,
Respondents

BRIEF OF THE TOLEDO EDISON COMPANY AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT

A complete statement of the facts is given here to show that there are no special or important reasons why certiorari should be granted in this case brought by petitioners. The facts standing alone show that the trans-

action involved herein need not occupy the time of this Court or any further time of the courts below.

In 1968, The Toledo Edison Company and The Cleveland Electric Illuminating Company, two electric utilities serving northern Ohio, acquired a privately owned 480-acre tract in Ottawa County, Ohio, along Lake Erie, known as the Darby Marsh. The United States in 1967 had acquired a formerly privately owned tract known as the Navarre Marsh, in the same county, consisting of about 455 acres of marshland and about 77 acres in one corner consisting mostly of upland. (A. 18a-19a)

The following land exchange took place between the utilities and the United States in the fall of 1968 (A. 19a):

The utilities received:

(1) Title to the Navarre Marsh (roughly 77 acres of mostly upland and 455 acres of mostly marshland).

The United States received:

(1) Title to the Darby Marsh (about 480 acres to be used as a wildlife refuge).

(2) The right under a rent-free lease to continue to use the entire 455 acres of marshland of the Navarre Marsh as a wildlife refuge for 50 years, except for a strip for a water channel (including buried intake and discharge pipes) and a reservation for facilities such as transmission lines, which by reason of the location of the marsh and the areas to be served by the utilities would probably affect very little, if any, of the land. Some service roads were required by the United States for wildlife management use.

(3) The right under a rent-free lease to use marshland adjacent to Navarre Marsh (135 acres) as a wildlife refuge for 25 years.

(4) The utilities would spend up to $175,000 to rebuild 3,200 feet of dike on the Darby property and maintain the dikes on the Navarre Marsh.

(5) The utilities at their expense would install three electric pumps at the Navarre Marsh to maintain proper water levels for wildlife refuge management.

The utilities thereafter proceeded with site preparation and later commenced construction of the Davis-Besse nuclear generating plant on the upland portion of the Navarre property and on adjacent land. Petitioners' amended complaint in this case attacking this exchange was filed in April of 1971 (almost two and a half years after the exchange). In order to complete the plant on schedule, to be able to serve the needs of the population in their service area and the commerce and industry dependent upon them for electric power, the utilities have felt compelled to continue to expend large sums in continuing the construction of the plant.

The Atomic Energy Commission is conducting an investigation of the environmental effects of the plant and hence this aspect of the plant location and construction has been and will be taken into account. (AEC Docket No. 50-346). The rules of that agency give organizations such as petitioners the right to intervene in environmental hearings and present evidence on that subject.

In summary, before the exchange the United States had about 455 acres of marshland (plus about 77 acres of mostly upland) for use as a wildlife refuge and the utilities had a 480-acre marshland tract (with some upland) for use in the construction of a nuclear generating plant. After the exchange the United States had the use of over 1,000 acres of marshland (including the same marsh exchanged) for wildlife refuge purposes along with a free new dike and pumps, and the utilities had 77

acres of upland (plus adjacent land purchased by the utilities from private persons) on which to build their plant, the environmental effects of which are being taken into account by the Atomic Energy Commission, the governmental body having jurisdiction over such projects.

While it is the position of the utilities that the decision of the United States Court of Appeals for the Sixth Circuit is clearly correct as a matter of law, even if it were not, the foregoing facts show that there are no special or important reasons why certiorari should be granted in this case, and justice and the welfare of the public will be served by denying the petition.

II

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. Summary of Argument

The substance of petitioners' complaint in the district court was that even though the Secretary of the Interior had broad power to exchange lands which he found suitable, the exchange should be set aside in spite of the fact that it nearly doubled the marsh refuge area in the same county. They claimed building an atomic plant adjacent to the Navarre Marsh rather than adjacent to the Darby Marsh (both of which continue as wildlife refuges) would not foster the *general wildlife conservation goals* of his office. Respondents assert that if this type of claim by an environmental group, two and a half years after the exchange, were held to state a cause of action, it would render the exchange statute meaningless as no purchaser could ever tell in advance if he had secured a good title. Congress did not intend to do a frivolous thing in passing the statute. The situation is different from ascertaining if specific conditions precedent had been complied with by

a government official. Petitioners' allegations did not state a cause of action and justice is served by the circuit court's decision.

The circuit court's decision that sovereign immunity protected this exchange does not require review by this Court. One of the most narrow and well established applications of the doctrine is involved in this case, *i.e.* that relief could not be granted by merely ordering the cessation of conduct complained of, but would require affirmative action by the sovereign in the disposition of unquestionably sovereign property. Modern recognition of the applicability of this rule is found in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948); *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 373 U.S. 609 (1963), and *Malone v. Bowdoin*, 369 U.S. 643 (1962).

Even though petitioners only ask that the utilities return the title to the land they received, well established principles of law recognized by this Court, the Ohio Supreme Court and numerous other courts require that if the exchange is set aside the Government would also have to reconvey to the utilities the land it received. Hence the forced conveyance of unquestionably sovereign property would result.

An additional reason for the applicability of sovereign immunity to this case is that the acts of the Secretary here did not come within the *ultra vires* exception to the rule. He had broad discretionary general authority to make the exchange without any specific conditions precedent. Whether or not the exchange was desirable or undesirable in fostering his general goals did not make it an *ultra vires* act. This case differs from *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). There the statute *prohibited* the act of the official *unless* certain *conditions precedent* were complied with. If he failed to do so, his acts were *ultra vires*. Also the relief there could be granted by ordering the cessation of con-

duct and did not require the disposition of unquestionably sovereign property.

Petitioners rely on cases involving construction of rights of grantees in federal land for mining, grazing and the like. This line of cases is distinguishable as it is based on the concept that due process and the statute giving the grantee rights in federal lands gives him the right to protect such a grant as against the Government itself. There are no such factors here.

The claim of petitioners that this Court should review this case because there is a conflict among the Federal Courts of Appeals as to the effect of the Administrative Procedure Act on the doctrine of sovereign immunity is not justified. This Court in *Blackmar v. Guerre*, 342 U.S. 512 (1952), recognized that the Administrative Procedure Act should not be deemed an implied waiver of all governmental immunity from suit. Any conflict among the circuits is one of language rather than of substance, as those cases which speak of waiver would come within the *ultra vires* exception to immunity anyway. Even more important, there is no case holding that the Administrative Procedure Act waived immunity in a case such as this where relief could not be granted by merely ordering cessation of conduct but affirmative action of the sovereign would be required in the disposition of unquestionably sovereign property.

There clearly are no special and important reasons for granting certiorari. The utilities acted in good faith in relying on the broad general authority of the Secretary to make the exchange and, after having deemed it necessary to spend millions of dollars to serve the public in reliance thereon, should not be harassed with further proceedings in this case.

B. The Amended Complaint Did Not State a Cause of Action.

The statute pursuant to which this exchange of land was made would be rendered virtually meaningless if construed as advocated by petitioners. If one securing title from the United States under a statute such as in this case, giving the Secretary of the Interior the power to exchange land "which he finds suitable for disposition" (16 *U.S.C.* § 668(b)(3)), could have his title defeated two and a half years after he acquired it by a claim that the Secretary's determination was not a wise one in carrying out the general duties and goals of his office, no one could ever risk making such an exchange. No lawyer could ever approve such a title. Congress would have done a frivolous and futile thing in passing the exchange statute.

Where there are *specific statutory conditions precedent* to a government officer performing an act (such as conveying land), a prospective purchaser can protect himself in advance by checking to see that they have been complied with. If they have not, the transaction can be attacked. However, where as here, the only requirement is that he "finds it suitable for disposition", there would be no way in which a purchaser could make a determination on which he can base a good title. He cannot guess in advance if the transaction would be held by a third person to tip the scales more on the desirable side than on the undesirable side in carrying out the general conservation duties of the Interior Department. To take title away from a purchaser under such circumstance would not be consistent with the most rudimentary principles of justice or reason.

The decision of the district court in dismissing the amended complaint and the affirmance of that decision by the appellate court achieved a just and proper result, as no cause of action was stated by allegations that the

exchange did not foster the general goals of the Secretary set forth in the statute.

C. The Decision In This Case Does Not Involve A Question of Law Which Has Not Been Settled By This Court, And It Is Not In Conflict With a Decision of This Court or Any Other Federal Court of Appeals.

1. Sovereign Immunity

(a) Affirmative Action In Disposing of Sovereign Property

The factual situation in this case does not require a new decision by this Court on the doctrine of sovereign immunity. It clearly falls within the most well established and narrowest application of the doctrine, as set forth in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948):

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22 (1890)."
>
> 337 U.S. 682, footnote 11 at 691
> (Emphasis added.)

The rule was again recognized and applied in *Hawaii v. Gordon*, 373 U.S. 57 (1963):

> "• • • We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign, if the decree would operate against the latter. E.g., *Dugan v. Rank*, 372 U.S. 609 (1963); *Ma-*

lone v. Bowdoin, 369 U.S. 643 (1962), *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949). Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and *cause as well the disposition of property admittedly belonging to the United States.*"

337 U.S. 57, 58
(Emphasis added.)

It was also applied in *Dugan v. Rank*, 373 U.S. 609 (1963), and in *Malone v. Bowdoin*, 369 U.S. 643 (1962).

It is apparent from the allegations of the complaint that the United States is now the owner in fee simple of the Darby Marsh and of a lease on most of the Navarre Marsh and adjoining marshland. There is no contest as to its present ownership. However, if the exchange were held illegal and set aside as requested, the foundation on which the Government's title rests would fall and its title would be destroyed. Equity would require the Court to order its reconveyance. This elementary proposition of logic and law has long been recognized by this Court, the Supreme Court of Ohio and other courts. In *Chapman v. County of Douglas*, 107 U.S. 348 (1882), a governmental body (a county) was held obligated to reconvey property acquired by an unauthorized contract. The same was held as to property received in an exchange of lands in *Stevens v. McCoy*, 60 Ohio St. 540 (1899), and the general recognition of the rule by other courts is set forth in 30 *Am. Jur.* 2d, *Exchange of Property*, Section 41:

"• • • No action for rescission of a contract of exchange of property is maintainable unless the party seeking the recission restores, or offers to restore, the other party to its original position by returning, or offering to return, whatever land, personalty or other property he may have received on the exchange from the other party."

This Court also recognized the applicable equity rule in *Rice & Adams v. Lathrop*, 278 U.S. 509 (1929):

> "• • • This conclusion finds support in the principle that 'a court of equity ought to do justice completely and not by halves,' and to this end, having properly acquired jurisdiction of the cause for any purpose, it will ordinarily retain jurisdiction for all purposes, including the determination of legal rights that otherwise would fall within the exclusive authority of a court of law. • • •"
>
> 278 U.S. 509 at 515

This doctrine was applied in *Katchen v. Landy*, 382 U.S. 323 (1966) at page 338. Equitable rules have long been recognized to apply to the United States, *U.S. v. Detroit Timber and Lumber Co.*, 200 U.S. 321 (1906), and *Jacobs v. U.S.*, 239 F.2d 459 (4th Cir. 1956), *cert. denied* 353 U.S. 904 (1957).

This is not a case where the utilities claim property was taken from them by the Government, giving rise to a claim for just compensation in the Court of Claims, as asserted by petitioners (Pet. 9). The utilities' claim to title is one based on a valid exchange of lands.

As this Court held in *Larson v. Domestic & Foreign Commerce Corp., supra.*, 337 U.S. 682 (1949), the question of whether or not the suit is against the sovereign is not determined by the form of the relief sought (here claimed only to be against the utilities), but whether it is "• • • in substance, a suit against the Government, over which the Court in the absence of consent has no jurisdiction." (at 687-688). Here the exchange itself is attacked and the substance is such that if the relief sought were to be granted it would require affirmative action by the sovereign and the disposition of unquestionably sovereign property, and hence the doctrine of sovereign immunity was properly applied.

Recent cases supporting the application of the doctrine of sovereign immunity to the instant case, where this Court

denied certiorari, are: *Simmonds v. Vinson*, 394 F.2d 732 (5th Cir. 1968), *cert. denied* 393 U.S. 968 (1968), and *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied* 380 U.S. 914 (1965).

(b) Ultra Vires Exception to Sovereign Immunity

There are, of course, many cases where a federal official exceeds his authority and affirmative action in disposing of sovereign property is not involved, *i.e.*, the *ultra vires* exception to sovereign immunity. This Court recognized such an exception in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948), discussed above:

> "• • • On a similar theory, where the officer's powers are *limited by statute*, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, *only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.* • • •"
>
> 337 U.S. 682, at 689-690
> (Emphasis added.)

This *ultra vires* exception to sovereign immunity is not applicable to the instant case. The Secretary was given the clearest and broadest possible authority by the language of 16 *U.S.C.* § 668dd(b)(3) to exchange lands "which he finds suitable". There were no express conditions precedent which had to be complied with. An analogous broad delegation of authority to the Postmaster General was claimed to be exercised in a manner which was "unlawful, arbitrary and capricious" and "in violation of Executive Order No. 10988", which outlined his *general powers and goals*,

in the case of *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 454, 455 (D.C. Cir. 1965), *cert. denied* 382 U.S. 978 (1966). The complaint was dismissed because of sovereign immunity and it was held that "an officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact if he is empowered to make the decision." (350 F.2d 456)

The court of appeals decision in the case at bar is not inconsistent with the case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), as claimed by petitioners. (Pet. 9). The question of sovereign immunity was not raised or decided in that case, but it is apparent that it would not have affected the result if it had been. The action was for an injunction against the Secretary of Transportation to enjoin him from releasing federal funds for the construction of a highway through a park and also to enjoin the Tennessee Highway Commissioner from building this segment of the highway with such funds.

The allegation was that the Secretary had failed to comply with two express conditions precedent required before approving such use of federal funds, *i.e.*, a proper determination if a feasible and prudent alternative route existed and, if none, then that all possible planning had been done to minimize harm to the park. These allegations clearly brought the case within the *ultra vires* exception to the doctrine of sovereign immunity. The Secretary was expressly forbidden by statute to release funds for this purpose unless he had complied with these conditions and if he failed to do so he was acting outside of his authority and such *ultra vires* action could not be protected by sovereign immunity. The relief sought could be granted by merely ordering the cessation of the conduct (disbursing the funds) and no affirmative action of the sovereign was required in disposing of unquestionably sovereign property.

The action of the Tennessee Commissioner was also tied in with building the road with federal funds which were not properly authorized. There was no attempt to secure an order specifically requiring him to dispose of state property. The relief sought was only to prevent him from improperly receiving federal funds to develop such property.

In the case at bar the statute did not specify any express conditions precedent and hence there was no *ultra vires* act. The relief requested would not order the cessation of the illegal use of federal funds in developing property but would require affirmative action by the sovereign in disposing of the title. Hence this case is clearly distinguishable from *Overton*.

Littel v. Morton, 445 F.2d 1207 (4th Cir. 1971) (Pet. 10, 17), was a case falling in the category of a government official acting beyond the authority specifically imposed upon him, in denying a lawyer's claim to fees for services performed for an Indian tribe.

Another such case is *National Forest Preservation Group v. Batz*, 343 F. Supp. 696 (D. Mont. 1972) (Pet. 13, 14), where plaintiffs sought to *enjoin* a conveyance by the Government and claimed a failure on the part of the government official to perform specific acts required of him under the laws and regulations relating to the type of exchange in question. The court concluded that there were no such violations which were prejudicial and that plaintiffs' dissatisfaction with the exchange was not a ground for setting aside the decision of the Secretary of Agriculture.

The case of *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971), cited at page 11 of the petition, is also not analogous. The court points out that the federal statute specifically required the officials to maintain decent, safe and sanitary dwellings; they were required to police the performance of contracts for this purpose, and

had specific authority to deal with violations. The court held that the allegations of the complaint were sufficient to charge the officials with acting *outside of their specific authority* and that the relief sought *would not interfere with the Government's title or possession of the properties.* Thus the court states at page 1052:

> "• • • In neither purpose nor effect will the prosecution of this suit disturb or diminish either the Government's title or its possession. • • •"

The mere fact that the Government owned the property was in itself not enough to bar the suit. It was a question of carrying out specific duties in regard to the properties. In the case at bar the effect of the suit would be to affect the *title and possession* of government owned property; it does not merely relate to management thereof.

Assertions by petitioners at pages 12, 13 and 14 of the petition in regard to other land exchanges by the Government which are not a part of the record of this proceeding have no relevancy whatsoever. The only exchange involved in this suit is the one described in the Statement of Facts at the beginning of this brief, which clearly does not present a special or important reason for granting certiorari.

(c) Cases Construing Government Grants

Petitioners rely heavily on a line of cases in federal courts determining claims of parties relating to their rights in federal lands, such as mining, homestead, grazing and forestry. It is concluded that these cases illustrate the right of the courts to make determinations in regard to federal lands. However, this line of cases is completely distinguishable from the case at bar. They are based on the concept that the statute giving the grantee rights in federal lands gives him a right to protect such a grant against the sovereign itself. He has a right to have a court determination of the validity of his rights.

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Thus in the case of *Coleman v. U.S.*, 363 F.2d 190 (9th Cir. 1966), cited at page 10 of the petition, the court states at page 196:

> "It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under others of the multifarious laws governing entries on public lands, who perfects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself, as well as third persons. * * *"
>
> 363 F.2d 190 at 196

It is the due process protection of the *grantee or acquiree's rights* which is undertaken by the courts – not affirmative action in disposing of admittedly sovereign property. This due process right is recognized in *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. 682 (1948), at page 607.

This difference will be seen in all such cases cited by petitioners: *Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1958) (Pet. 10), mining claim; *Brennan v. Udall,* 379 F.2d 803 (10th Cir. 1967) (Pet. 11), oil rights; *Lewis v. Hickel,* 427 F.2d 673 (9th Cir. 1970) (Pet. 13), grazing rights; *LaRue v. Udall,* 324 F.2d 428 (D.C. Cir. 1963) (Pet. 13), grazing rights; *Boesch v. Udall,* 303 F.2d 204 (D.C. Cir. 1962) (Pet. 14), oil and gas lease; *McNeil v. Seaton,* 281 F.2d 931 (D.C. Cir. 1960) (Pet. 14), grazing rights; and *McKay v. Wahlenmaier,* 266 F.2d 35 (D.C. Cir. 1955) (Pet. 14), oil and gas lease.

(d) Effect of Administrative Procedure Act

Petitioners' contention at pages 15 through 17 that the Administrative Procedure Act constitutes a general waiver of sovereign immunity does not present any special or important reason why certiorari should be granted in this case. This Court has already rejected such a contention. In *Blackmar v. Guerre,* 342 U.S. 512, 515-516

(1952), it was stated, "Still less is the Administrative Procedure Act to be deemed an implied waiver of all governmental immunity from suit."

The several decisions by this Court applying the doctrine of sovereign immunity, discussed above (at 8 and 9), were all decided after the passage of the Administrative Procedure Act. The case at bar is of the type to which the courts have consistently and traditionally applied the doctrine both before and after the passage of the Administrative Procedure Act, *i.e.* one requiring affirmative action by the sovereign in disposing of unquestionably sovereign property.

Judge Green, in giving the district court's opinion dismissing the petitioners' first complaint in this action, cites pertinent legislative history showing that there was no legislative intent to do such an extreme act as to wipe out sovereign immunity without even mentioning it. That opinion states:

> "The Court has reviewed the legislative history of the A.P.A., Senate Doc. 248, 79th Cong., 2nd Sess., (1944-1946), and finds no indication therein that the judicial review provisions, Section 10 of the Act, were intended to have any substantive effect. In fact, the contrary appears. Carl McFarland, a member of the Attorney General's Committee and Chairman of the American Bar Association's special committee on administrative law, in testimony before the House Committee on the Judiciary stated:
>
> > . . . we do not believe that the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved. We believe that about all the statute should or could do would be to state the form of the action, *the type of acts that are reviewable in accordance with present law,* the authority of the courts to grant temporary relief so that review may be useful, *but that the scope of review should be as it is now.* (Emphasis added.)

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> In a letter from the Hon. Tom C. Clark, then United States Attorney General, incorporated into the report of the Senate Committee on the Judiciary, it is stated that Section 10 of the A.P.A. was intended to, and did, reflect existing law on the availability of judicial review of administrative actions."

In the case of *Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967), the Secretary of the Interior was one of the defendants. The court held in regard to the claim that the Administrative Procedure Act waived sovereign immunity, as follows:

> "° ° ° This reliance on § 10 of the Administrative Procedure Act to establish jurisdiction below is misplaced. Section 10 of the Act does not confer jurisdiction upon the federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction. Ove Gustavsson Contr. Co. v. Floete, 278 F.2d 912, 914 (2nd Cir. 1960); Barnes v. United States, supra. Additionally, § 10 does not in itself amount to congressional consent to a suit against defendants, whose right to assert the defense of sovereign immunity is discussed above. ° ° °"
>
> 370 F.2d 529 at 532

As recognized by petitioners at page 17 of their petition, a similar holding is found in *Cyrus v. United States,* 226 F.2d 416, 417 (1st Cir. 1955), and in *Coalition for United Community Action v. Romney,* 316 F. Supp. 742, 746 (N. D. Ill. 1970); *Chournos v. United States,* 335 F.2d 918, 919 (10th Cir. 1964); *Cotter Corp. v. Seaborg,* 370 F.2d 686, 692 (10th Cir. 1966), and *Motah v. U.S.,* 402 F.2d, 1, 2 (10th Cir. 1968).

Petitioners, also at page 17 of their petition, claim that the decisions of the Tenth Circuit are divided on this issue and cite the case of *Brennan v. Udall,* 379 F.2d 803, 805 (10th Cir. 1967). There is no language in the opinion

stating that the Administrative Procedure Act waives sovereign immunity. The Court held that plaintiff was entitled to have his patent granted by the United States interpreted under the Act as to whether or not it included oil. As has already been discussed, permitting interpretations of land grants is based upon the theory that the laws permitting such grants gave a due process right to the patentee which was good against the Government as well as third persons and that it has long been recognized that he could assert such right against the Government. Hence, there is no such conflicting decision on the waiver issue in the Tenth Circuit – the holdings of the court in that circuit are that there is no such waiver. Also, in *National Helium Corp. v. Morton,* 455 F.2d 650, 654, 655 (10th Cir. 1971), the court recognizes the validity of *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. 682 (1949), but distinguishes it on the grounds that Secretary Morton was specifically required by law to do certain things, which he failed to do, and hence that case fell within the exception to *Larson.*

Petitioners' claim (Pet. 16) that the Ninth Circuit case of *Washington v. Udall,* 417 F.2d 1310, 1320 (9th Cir. 1969), significantly narrows the defense of sovereign immunity is refuted by the language of the opinion. The court states at page 1320:

> "While we hold that the Secretary's challenged action in this case is subject to judicial review under the Administrative Procedure Act, *we strongly emphasize our opinion that such review is not available on the theory that the Act constitutes a consent of the United States to all suits of whatever nature and, as such, a blanket waiver of sovereign immunity.* In any case wherein the immunity doctrine is so transcending as to require dismissal of the suit, the Act does not provide for Administrative Review. The Supreme Court has not found jurisdiction under the Administrative Procedure Act in cases wherein the actions of

the Secretary of the Interior have been held to be shielded from judicial review by sovereign immunity. *See* City of Fresno v. California, supra, 372 U.S. 627, 83 S. Ct. 996, 10 L.Ed. 2d 28; Dugan v. Rank, *supra*, 372 U.S. 609, 83 S. Ct. 999, 10 L.Ed. 2d 15. See also Blackmar v. Guerre, 342 U.S. 512, 515-516, 72 S. Ct. 410, 412, 96 L.Ed. 534 (1952) (8-1 decision concerning review of a Civil Service Commission decision) 'Still less is the [Administrative Procedure] Act to be deemed an implied waiver of all governmental immunity from suit,'; Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964); L. Jaffe, Judicial Control of Administrative Action 372 (1965) (Administrative Procedure Act has had a negligible effect on the basic right to judicial review but does codify the presumption of reviewability.)"

417 F.2d 1310 at 1320
(Emphasis added.)

While the opinion in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), has some ambiguous language, it still recognizes that where the doctrine of sovereign immunity is applicable it must be applied.

The Court of Appeals for the Fifth Circuit made a general statement regarding the A.P.A. waiving sovereign immunity, as pointed out by petitioners (Pet. 15, 16), in *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961). That case involved an action by aliens to review a determination excluding them from the United States. However, in a case seven years later that same court of appeals applied the doctrine of sovereign immunity in the case of *Gardner v. Harris*, 391 F.2d 885 (5th Cir. 1968), to bar a suit brought to compel a federal superintendent of Natchez Trace Parkway to remove certain barricades which it was claimed exceeded his statutory authority and thus made him amenable as an individual to injunctive relief. The court states at page 888:

"• • • Undoubtedly if a Federal Court were to order the Superintendent to remove the barricades, this

> would be compelling the Government to act. Likewise it would be interfering with public administration since it would have an immediate physical bearing upon the governmental judgment on such matters as the number, type, and location of access ways from the standpoint of safety, traffic flow, and the like. • • •"
>
> 391 F.2d 885 at 888

Since these same things could be said about the judgment prayed for in the case at bar, we must assume that the Court of Appeals for the Fifth Circuit would also hold that sovereign immunity barred the petitioners' action here.

The waiver language in *Kletschka v. Driver*, 411 F.2d 436, 445 (2nd Cir. 1969), cited by petitioners at page 16, is only dicta, as the court specifically found apart from the waiver theory that the suit was of a type which "would not contravene sovereign immunity."

The case of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), (Pet. 15) (which, as petitioners point out, is contrary to an earlier decision in that court) involved an action to nullify the action of the Federal Aviation Administration in letting a contract to a bidder whose bid it was claimed did not conform to the bid requirements. It was simply an action by a federal official beyond the scope of his authority, *i.e., ultra vires*, where sovereign immunity would not have been applicable even in the absence of the Act.

Thus, while there is some confusing language in the Court of Appeals cases cited for the Second and District of Columbia Circuits, such language was not necessary for the holdings in the cases and hence it is not a conflict of substance but a conflict of language with the case of *Blackmar v. Guerre*, *supra*, 342 U.S. 512 (1952), and the cases cited from the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits. All of the district court cases cited on page 16 of the petition also involve *ultra vires* actions by governmental officials which would not have been subject

to the defense of sovereign immunity anyway. Hence the language in the opinions relating to the Administrative Procedure Act was not necessary and the cases are not significant in this regard.

Even though the language relating to the Act in the Second and District of Columbia Circuit cases can be distinguished on the ground that it was unnecessary to the decision as above described, there is one overriding reason why the decision of the Sixth Circuit in this case on sovereign immunity is not in conflict with the decisions of the Court of Appeals for the Second Circuit, the District of Columbia Circuit, or any other circuit on the question of the Administrative Procedure Act waiving sovereign immunity. No cases whatsoever have been cited by petitioners holding that the Administrative Procedure Act waives sovereign immunity when the relief requested cannot be granted merely by ordering the cessation of the conduct complained of but will require affirmative action by the sovereign disposing of unquestionably sovereign property, as would be the result in this case. There is no language in the A.P.A. which deals with an action which is, in substance, *in rem* against government property, rather than against an official of the Government who has exceeded express limits on his authority. There clearly is no conflict between the case at bar and any other Supreme Court or court of appeals case.

III

CONCLUSION

Certainly this is a case where no special or important reasons exist for granting certiorari. On the contrary, it is one where the public interest and justice will be greatly served by denying the petition.

The utilities relied on a broad unconditional legislative grant of authority in exchanging lands. Their obli-

gation to furnish much needed electric power compels them to continue to construct a generating plant on a small portion of the land received and the environmental effects are specifically considered by the agency controlling such construction. In fact, the environment is obviously benefited by the United States having nearly twice as much marsh area for wildlife refuge as it had prior to the exchange.

To permit a complaint to stand two and a half years after the exchange which merely challenges the desirability of the exchange in the opinion of the plaintiffs insofar as the general goals of wildlife protection are concerned, would not only be unjust and defeat congressional intent in giving the exchange authority, but it would also be contrary to the best established and narrowest concept of sovereign immunity. If sovereign immunity has any meaning, it is to protect a transaction such as this.

The petition for certiorari should be denied.

Respectfully submitted,

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The Toledo Edison Company
and The Cleveland Electric
Illuminating Company

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1005

SIERRA CLUB, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

In October 1968, the Secretary of the Interior completed an exchange of marshlands with two public utility companies, Toledo Edison Company and Cleveland Electric Illuminating Company, under 16 U.S.C. 668dd(b)(3). Under the agreement, the utility companies transferred to the United States, to become part of the Ottawa Federal Wildlife Refuge, a 480-acre tract of land in Ottawa County, Ohio, abutting on Lake Erie, and known as Darby Marsh. In exchange, the utilities received a nearby tract of land from the same Wildlife Refuge in Ottawa County, also bordering on Lake Erie, which was known as Navarre Marsh, and which consisted of 455 acres of marshland and an additional 77 acres in one corner of mostly upland.

The companies contemplated constructing on the dry portion of the land they acquired the Davis-Besse Nuclear Power Station.[1] They agreed to lease back to the United States, rent free for fifty years, the unused part of Navarre Marsh, or approximately the 455 acres of lowland, together with some adjacent property (to be leased for twenty-five years), and to install and maintain dikes and electric pumps in the area. As the court of appeals stated (Pet. App. 19a), "[u]pon completion of the exchange, the United States had a wildlife refuge of twice the number of acres it originally had (less the strips for canals and reserved rights)," in addition to other "improvements and benefits."

Two years after the land exchange became final, petitioners commenced an action in the United States District Court for the Northern District of Ohio, seeking to nullify the transaction as being contrary to the underlying statute (16 U.S.C. 668dd) and in violation of a treaty with Mexico, to enjoin construction of the Davis-Besse plant, and to obtain a declaration that 16 U.S.C. 668dd is unconstitutional. The district court (Green, J.) dismissed the complaint on grounds of sovereign immunity and of failure to state a claim on which relief could be granted (Pet. App. 2a-3a).

An amended complaint was then filed in the district court "which was a radical departure from [the] original complaint" (Pet. App. 17a). It contained a single cause of action challenging the Secretary of the Interior's transfer to the utility companies of title to Navarre Marsh as "an

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[1]Petitioners abandoned their efforts to enjoin construction of the power station in 1971, and we are advised that the companies have expended more than half the funds projected for construction and that the power station is over 40 percent completed.

arbitrary and capricious act" which "constitutes an abuse of discretion" (Pet. App. 17a). Without referring to the Darby Marsh exchange, the complaint sought an order directing the utilities to return Navarre Marsh to the United States.

The Secretary and the companies filed a motion to dismiss. The district court (Thomas, J.) granted the motion, holding that the action was barred by the doctrine of sovereign immunity, and involved a challenge to "'agency action * * * committed to agency discretion by law,' 5 U.S.C. § 701(a)(2)," which is "not reviewable under the Administrative Procedure Act" (Pet. App. 14a-15a). A divided court of appeals affirmed (Pet. App. 16a-41a).

Petitioners contend here, as they did below, that the present land exchange, consummated in 1968, should be partially set aside because the Secretary's decision to transfer Navarre Marsh, although authorized by 16 U.S.C. 668dd, was made in an arbitrary and capricious manner.[2] Both the district court and a majority of the court of appeals fully considered petitioners' arguments and determined that they were barred by the doctrine of sovereign immunity. For the reasons stated in those opinions, on which we rely, we submit that the court of appeals correctly held that (Pet. App. 26a-27a):

> Here the United States and the two utilities have owned, possessed and used for more than two years the lands which they respectively acquired by deeds of conveyance in the exchange. The District Court has no jurisdiction to undo and unravel the transaction.

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[2]Petitioners do not seek to divest the United States of title to Darby Marsh acquired in exchange for Navarre Marsh (Pet. App. 17a-18a).

We add only that the present land exchange transaction was consummated prior to enactment of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, and thus was not subject to the requirement in that statute that an Environmental Impact Statement be prepared and filed considering the various ecological effects that might result from this federal action. See 42 U.S.C. 4332(C); and see *San Francisco Tomorrow* v. *Romney*, C.A. 9, No. 72-1969, decided January 18, 1973.[3] Since it is clear that future land exchanges of this magnitude under 16 U.S.C. 668dd will, by contrast, require the preparation of a NEPA statement which is subject to judicial scrutiny, the present case does not raise any issue of continuing general importance that warrants the attention of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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[3]The construction in Navarre Marsh of the Davis-Besse plant has been the subject of separate litigation under NEPA. See *Coalition For Safe Nuclear Power and Living in a Finer Environment* v. *Atomic Energy Commission*, C.A.D.C., No. 71-1396, appeal dismissed, December 27, 1972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1005

SIERRA CLUB AND CITIZENS FOR CLEAN AIR AND WATER,
Petitioners,

v.

ROGERS C. B. MORTON, Secretary of Interior, ET AL.,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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1. Both the government (Gov. Br. 2) and the utility companies (Utility Br. 1-4) contend that there is no reason for this Court to review the decision below because the United States now has use of 1,000 acres of marshland for wildlife-refuge purposes (the total of the land obtained from the utility companies and most of the land given to them) in comparison to only some 500 acres before the land exchange. However, the facts alleged in the amended complaint must be taken as true in reviewing the determination to dismiss it. The amended complaint alleged that the marsh given to the utility companies was an excellent wildlife refuge (para. 8); that construction of the nuclear power plant "would cause serious and permanent damage to the marsh areas and its ecological systems, thereby rendering the marsh largely unfit for migratory bird inhabitation" (para. 9); and that the discharge of radioactive materials from

the plant will cause serious damage to wildlife using the marsh (para. 10). The amended complaint further alleges that the marsh obtained by the federal government from the utility companies "is a wildlife refuge of extremely poor natural quality as compared to [the land given up]" (para. 18). In short, the facts as they come before this Court are that the federal respondents have surrendered an excellent wildlife refuge of over 500 acres and now have over 1,000 acres, none of which is suitable for this important purpose.

2. The government's principal contention in opposing certiorari (Gov. Br. 4) is that this case involves a transaction which occurred prior to enactment of the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, that NEPA will require the preparation of an environmental-impact statement for future land exchanges, and that therefore "the present case does not raise any issue of continuing general importance that warrants the attention of this Court." However, the preparation of an environmental-impact statement would have no relation to the present case. Even if impact statements are prepared in the future, they will only require consideration of various environmental factors. 42 U.S.C. 4332(2)(C). In contrast, petitioners contend that the statutes relied upon impose entirely separate substantive requirements relating to protection of the National Wildlife Refuge System. The issue whether suits under these statutes are barred by sovereign immunity will continue to be raised in the future despite the passage of NEPA.

3. The government's other reason for opposing certiorari is that the decision below is correct. As we showed in the petition, the decision below is in conflict with several decisions of this Court and the courts of appeals and the issues presented are of major importance to the administration of federal lands.

4. The utility companies claim (Utility Br. 8-9) that, even if a complaint alleges that a federal officer has acted unconstitutionally or beyond his statutory powers, sovereign immunity still bars suit if the action involves the disposition of federal property. However, the cases, upon which the companies rely, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, note 11 (1948), and *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963), state that this rule applies only as to "unquestionably sovereign property" and to "property admittedly belonging to the United States." Similarly, in *United States* v. *Lee*, 106 U.S. 196 (1882), this Court held that suit could be brought to recover property unconstitutionally taken by the United States. If this case does involve land obtained by the United States (contrary to our argument below that petitioners seek only to recover land divested by the United States), it is because this land was obtained pursuant to an exchange of land which was allegedly in violation of law. The property held by the United States is not unquestionably or admittedly federal property and sovereign immunity does not apply.

5. Petitioners seek only to have the property of the United States, which was exchanged in violation of federal statutes, returned to the United States. The utility companies (Utility Br. 9-10), citing ordinary equity principles, state that, if the United States recovered the land it gave up, it would be compelled to return to the companies the property it had acquired from them.

Ordinary law concerning rights to private land does not apply. Article IV, Section 3, clause 2 provides:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States * * *.

Numerous decisions of this Court have interpreted this clause to give Congress exclusive jurisdiction over the disposition of land or other property of the United States and to give no such power to the head of an executive agency without legislation by Congress. *E.g.*, *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 336 (1841); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941). Laches, estoppel, and other equitable doctrines do not apply when the agents of the United States take action concerning federal lands beyond the power conferred on them by Congress. *E.g.*, *Hart* v. *United States*, 95 U.S. 316, 318 (1877); *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Wilber Nat. Bank* v. *United States*, 294 U.S. 120, 123-124 (1935).

Here, the utility companies attempt to invoke an equitable doctrine in order to prevent any judicial consideration of the issue whether federal officials have disposed of federal lands without authorization by Congress. In doing so, they cite only cases and other authorities relating to transactions between private parties or local governments. These principles, however, are not applicable to the federal government—particularly since the companies have a remedy in the Court of Claims (see Pet. 9).

In any event, even if equitable principles do apply to cases involving federal-land transactions, sovereign immunity still does not bar this action. Plaintiffs seek, as the government admits (Gov. Br. 3, note 2), only the recovery of land for the United States which was wrongfully disposed of by federal officials. It is the utility companies who are contending that equitable principles require the United States to return the land obtained from the companies. The companies' contention is in the nature of a cross-claim against the United States for recovery of their land if the companies are required to return the land they obtained from the United States.

The real sovereign-immunity issue is whether the companies' cross-claim is barred by sovereign immunity and whether their sole remedy is a suit for compensation in the Court of Claims. Regardless of the resolution of that question, petitioners are entitled to have the courts determine the separate issue whether the companies must return the land they obtained to the United States. Sovereign immunity cannot possibly apply to this action. Even if sovereign immunity is deemed to prevent suit against the United States, this claim can still continue to be maintained against the companies alone.

6. This Court has stated, in summarizing the purpose of the doctrine of sovereign immunity, that "[t]he Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 704. This is, like many land-exchange cases, clearly not a situation where the government will be stopped in its tracks if petitioners' obtain judicial review of the exchange. This transaction was initiated by the utility companies for their own purposes in order to obtain federal land they desired. If anyone will be stopped, it will therefore be the companies. Certainly, sovereign immunity was not designed to protect private parties from judicial determinations whether land came into their possession legally.[1]

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[1] As petitioners showed (Pet. 14-17), there is a square conflict of circuits between the decision below and the Courts of Appeals for the District of Columbia, Second, Fourth, Fifth, and Ninth Circuits as to whether the Administrative Procedure Act constitutes a complete or partial waiver of sovereign immunity. The utility companies have clearly not shown (Utility Br. 15-21) that the decisions are consistent. For example, while the utility companies (Utility Br. 19-20) assert that the Fifth Circuit supports their position that the Administrative Procedure Act does not waive sovereign immunity, the only case they cite is *Gardner* v. *Harris*, 391 F.2d 885 (C.A. 5, 1968), which did not arise under

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

MARCH 1973

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that Act. The decision of the Fifth Circuit in *Estrada* v. *Ahrens*, 296 F.2d 690, 698 (1961), that the Act does constitute a Congressional waiver of sovereign immunity, therefore continues to be good law and is in direct conflict with the decision below.

2-1063 FILE COPY

FILED
JAN 31 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1063

HERMAN P. UNGER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

HERMAN P. UNGER, JR.,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the U.S. Circuit Court of Appeals for the Seventh District on this cause on November 28, 1972.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit has not been reported as yet but is reprinted herein as Appendix A, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on November 28, 1972. A timely petition for rehearing was denied on January 2, 1973 (Appendix B). This petition is filed within 30 days of the final order of the Circuit Court of Appeals. The jurisdiction of this court is invoked under 28 U.S.C. 1257.

QUESTION PRESENTED

Does a hearsay affidavit for a search warrant state probable cause when it does not set forth the reliability of the hearsay information nor is the hearsay information corroborated in any manner and where there is no allegation as to when the informant received the information related to the affiant?

CONSTITUTIONAL PROVISION INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV, U.S. Constitution.

STATEMENT

Your petitioner, Herman Unger was charged with a violation of Section 26 U.S.C. 5861(d) for failing to register certain firearms. He was found guilty and fined $500. The weapons which were alleged not to have been registered were found as a result of an execution of a search warrant issued by a Judge of the Circuit Court of Cook County, Chicago, Illinois for the search of his premises. A verbatim copy of the search warrant and complaint for said search warrant is attached hereto. (Appendix C.) A timely motion to quash the warrant and to suppress the evidence was denied. The complaint for the warrant was based on the affidavit of the police officer who stated that he talked to a citizen who had given him certain information about the weapons in question. There was no identity of the citizen; there was no allegation of reliability of this citizen; nor was there any allegations of evidence corroborating the hearsay information. Further, there was not time set out in the warrant as to when the informant allegedly saw the property in the basement of the defendant's home.

REASONS FOR GRANTING THE WRIT

A.

A HEARSAY SEARCH WARRANT WITH NO ALLEGATIONS OF RELIABILITY OR EVIDENCE OF CORROBORATION AND WITHOUT INDICATION OF THE TIMELINESS OF THE INFORMATION DOES NOT ESTABLISH PROBABLE CAUSE TO SUPPORT A VALID SEARCH WARRANT.

B.

THERE IS A DEFINITE SPLIT AMONGST THE CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHAT INFORMATION IS SUFFICIENT TO ALLEGE TIMELINESS OF THE INFORMATION CONTAINED IN THE COMPLAINT FOR WARRANT.

The complaint for the search warrant, which is set out in the appendix hereto, (Appendix C) alleges that the affiant, Investigator Monroe Vollick, is a Chicago Police officer; that he was contacted by a citizen who had occasion to be in the basement located at 5424-26 N. Ashland while working at his occupation and saw in an enclosed locker at that location a cache of weapons and ammunition. The complaint further states that the citizen said that he was familiar with weapons, having served in the United States Army and worked in ordinance, (sic) and that he knew what the weapons were. The search warrant called for the seizure of:

> "A cache of weapons including machine guns, machine guns with tripods, rifles, rocket launchers, cases of ammunition for the above weapons, all in violation of the Illinois Revised Statutes."

BLEED THROUGH POOR COPY

These weapons were sought by way of the search warrant because of the alleged violation of the Illinois unlawful use of weapons statutes and failure to register weapons statutes.

Not one word is mentioned in the complaint for the warrant as to what weapons the citizen allegedly saw or that there were in fact machine guns, rocket launchers, or any other specified weapons in that locker. Further, there was no allegation that any of these weapons were not registered pursuant to law or that any of the weapons were in operable condition.

More importantly, however, the complaint is based on pure and simple hearsay which does not state anything to establish the reliability of that hearsay and is therefore insufficient to establish probable cause for the search of the defendant's premises. This court in a landmark decision of *Aguilar* v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) held:

> "Although an affidavit may be based on hearsay information and need not reflect the direct observations of the affiant (citations) the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed (citations) was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate' as the constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime' . . . or, as in this case, by an unidentified informant." 12 L. Ed. 2nd at 729.

In that case the Court held that the search warrant should not have been issued and that the trial court erred in not

quashing it. In the *Aguilar* case the affiants, who were two police officers, had "reliable information from a credible person" to believe that certain items were in the defendant's premises.

In the instant case the affiant-officer said he talked to a "citizen". He does not in any way establish whether this was an anonymous phone call; whether this was a personal meeting or what. Nowhere is the issuing magistrate informed that this "citizen" had been reliable in the past or was corroborated in any way by the police officer. We have here a bare hearsay affidavit with no independent reliability established. If a complaint for a warrant such as this can stand then the police officer becomes the judge of probable cause which is what the Court in *Aguilar, supra,* condemned.

On the week following the decision in *Aguilar* v. *Texas, supra* this Court in a *per curiam* opinion vacated a judgment citing *Aguilar* v. *Texas. Etchieson* v. *Texas,* 378 U.S. 589, 84 S. Ct. 1932, 12 L. Ed. 2d 1041 (the case below is cited in 372 S.W. 2nd 690.) In that case the warrant stated that the police officer had been informed of the existence of certain facts by a "reliable, credible and trustworthy citizen of Dallas, Texas". The Court in reversing the judgment found that was insufficient to state probable cause and only cited *Aguilar* to support its decision. In another *per curiam* decision in *Riggan* v. *Virginia,* 384 U.S. 152, 86 S. Ct. 1378, 16 L. Ed. 2nd 431 (1966) the Court reversed the conviction citing only *Aguilar* v. *Texas, supra.* The complaint for the warrant in that case which is found at 144 S.E. 2nd 298 stated that the probable cause is based on facts "personal observation of the premises and information from sources believed by the police department to be reliable."

In *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 554, 21 L. Ed. 2d 637 (1967), the Court held that under the standards of *Aguilar* where there was no showing that the informant was "reliable" and where there was not sufficient underlying circumstances from which the informant had concluded that the defendant was committing the crime, the warrant should be quashed.

The 7th Circuit in a number of cases has followed the decisions of *Aguilar* and *Spinelli* to the extent of reversing convictions. In the case of *United States* v. *Higgins,* 428 F. 2nd 232 (7th Cir., 1970) the Court held that an affidavit which stated information "from an informant who on prior occasions has furnished information which has proved reliable . . ." was insufficient to establish the reliability of the hearsay information. The Court, in reversing that judgment, cited the authority of *Aguilar* and *Spinelli.* Other cases in the same circuit which have also held that information such as contained in this warrant to be insufficient are *United States* v. *Roth,* 391 F. 2nd 507 (1968); *United States* v. *Davis,* 402 F. 2nd 171 (1968).

As this warrant was issued under the authority of the Circuit Court of Cook County a review of Illinois cases shows that this warrant was insufficient to have been issued for State prosecution. A bare anonymous tip (which is all we really have here,) is insufficient to establish probable cause for an arrest. *People* v. *Parren,* 24 Ill. 2nd 542, 182 N.E. 2nd 662 (1962). In *People* v. *Waitts,* 36 Ill. 2nd 467, 224 N.E. 2nd 257, the Illinois Supreme Court held that an arrest warrant which did not state any basis for the arrest and which was based on strictly uncorroborated hearsay was insufficient to arrest a defendant and anything found pursuant to that arrest was inadmissible.

The Supreme Court of Illinois has also had the occasion to scrutinize an affidavit for a search warrant very similar to this one. In *People* v. *Parker,* 42 Ill. 2nd 42, 245 N.E. 2nd 487 (1969) the police officer swore that "he has been informed by an informant who had previously given information to the complainant which had proved to be true" that the defendant had a quantity of marijuana in his home which the informant had personally observed. The Illinois Supreme Court said the warrant was invalid because the magistrate who issued it hadn't been given any information from which the affiant had concluded that the informant was reliable.

In the instant case there has not even been an attempt to say that the informant was reliable but only that the officer spoke to a "citizen." We all know that citizens are, at times, paid police informants and the fact that the officer called his informant a "citizen" does not raise his information to the level of reliability. As pointed out earlier, in *Etchieson* v. *Texas, supra,* the officers said they received the information from "citizen" of Dallas, Texas. This Court reversed the case in a *per curiam* opinion.

No probable cause having been shown for the issuance of the warrant was therefore invalid and anything found during execution of said warrant is inadmissible.

Furthermore, there is no showing whatsoever in the complaint for the search warrant that the information from this anonymous informant was at all timely. The issuing magistrate, the trial court and this Court must guess as to when this "informant" allegedly saw these weapons and when he told the police about them. Of course, what could be probable cause on one date might not be with the passage of time, especially with regard to items which are easily moved from place to place. *Sgro* v. *United States,* 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260.

The Seventh Circuit in its decision in the instant case has now drastically differed from the First and Sixth Circuit Courts of Appeal. In the present case, the printed portions of the form used by the affiants stated that the affiant "has probable cause to believe that (certain items) are now located" upon the defendant's premises. The Seventh Circuit relied on that language to indicate that the information which the affiant had received was of recent origin. The court felt that the recitation of those facts in the present tense would inspire expedient disclosure to authorities and therefore attest to the timeliness of the complaint for the warrant. In *Rosencranz* v. *United States*, 356 F. 2nd 310 (1st Cir., 1966) that Circuit held that the language in the affidavit which spoke in the present tense was insufficient to establish probable cause that the articles were on the premises sought to be searched. The court went on to hold:

> "The present tense is suspended in the air; it has no point of reference. It speaks, after all, of the time when the anonymous informer conveyed information to the officer which could have been a day, a week or months before the date of the affidavit."

The court pointed out that officers with information of questionable recency could escape embarrassment by simply omitting averments as to time so long as they reported that whatever information they received was stated to be current at that time.

The Sixth Circuit in *United States* v. *Boyd*, 422 F. 2nd 791 (1970) was presented with a proposition that the affidavit for search warrant said "there is *now* being concealed certain property . . ." However, the date of the observation was not supplied to the commissioner under oath and the door was then open to the allegation of a present offense based on stale information. The Sixth

Circuit then, based on the authority of *Rosencranz, supra,* vacated the judgment of the District Court which had held the complaint for the warrant to be sufficient. The Ninth Circuit in *Poldo* v. *United States,* 55 F. 2nd 866 (1932) also held that warrants without indication as to time were insufficient notwithstanding use of a present tense.

The Seventh Circuit in the instant case is relying upon the printed material on a form issued by the Clerk of the Court which should in no way be a substitute for factual information upon which a neutral and detached magistrate can make an intelligent decision as to whether there is probable cause to issue the search warrant.

CONCLUSION

We respectfully pray that the petition for certiorari be granted, and that this conviction be reversed.

Respectfully submitted,

PATRICK A. TUITE,
134 N. LaSalle Street,
Suite 2200,
Chicago, Illinois 60602,
Attorney for Petitioner,

APPENDIX A

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 72-1149

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HERMAN P. UNGER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois
No. 70-CR-690
William J. Lynch,
Judge.

ARGUED: OCTOBER 17, 1972—DECIDED: NOVEMBER 28, 1972

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD, *Circuit Judge* and GRANT, *District Judge.**

DUFFY, *Senior Circuit Judge.* Defendant-appellant is a licensed firearm dealer. He was tried before the court on a three-count indictment charging possession of unregistered firearms in two counts and a failure to keep registration records in the third count. Defendant was found guilty of the possession charge in Count-I[1] and was fined $500. Defendant appeals.

*Chief Judge Robert A. Grant of the U.S. District Court for the Northern District of Indiana is sitting by designation.

1. Predicated on a statutory violation of 26 U.S.C. § 5861(d).

On December 20, 1970, pursuant to a search warrant, Chicago police detective Vollick and several other City police officers went to defendant's apartment located in Chicago, Illinois. Defendant Unger was present when the officers arrived and led the officers to the basement of his apartment. A number of weapons were discovered in a basement locker including machine guns, rifles, pistols, hand grenade casings, black powder, fuse assembly kits for hand grenades and M-2 conversion kits.

Daniel Harnett, a U.S. Treasury agent, testified that he heard an Assistant State's Attorney warn defendant of his constitutional rights. Later, when defendant was asked whether the M-2 conversion kits were registered defendant replied, "No, you've got me there".

At the trial, defendant moved for a judgment of acquittal without tendering any witnesses after the government had presented their evidence. The basis for this appeal is that the trial court erred in denying defendant's pre-trial motion to quash the search warrant. Therefore, questions concerning the constitutional requirements for obtaining a state search warrant are now before us.

The complaint for the warrant alleged that a private citizen, while working at his occupation, had occasion to be in the basement of an apartment building located on North Ashland Avenue, Chicago. In the course of his work, he observed an enclosed locker in the southeast corner of the basement. There was a small opening in the locker through which a cache of weapons was visible.

The citizen called the police, and based upon his experience with weapons gained while in the Ordnance section of the United States Army, he described the firearms and materials with particularity.

Thereafter, the citizen personally identified the building in question to the police and drew a diagram of the basement disclosing the exact location of the locker where the weapons were stored.

Based upon this information, Detective Vollick, the complainant in the warrant, applied to a magistrate and obtained a search warrant to search the locker and seize the specific weapons which had been described to him by the citizen.[2]

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2. The complaint for the warrant provided in pertinent part:

". . . [C]omplainant . . . requests the issuance of a search warrant to search (the person of Herman Unger and locker in basement at 5424 and 26 N. Ashland, Chicago, Ill., location of locker S/E corner of basement, and seize the following instruments, articles and things: a cache of weapons including machine guns, machine guns with tripods, a rocket launcher, automatic and semi-automatic rifles, and ammunition for the above weapons, which have been used in the commission of, or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register.

Complainant says that he has probable cause to believe, based on the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above: The complainant, [is] a police officer for the City of Chicago, presently assigned to Robbery Investigations . . . The officer was contacted by a citizen, who had occasion to be in the basement located at 5424 and 26 North Ashland while working at his occupation, saw in an enclosed locker in that basement, location of locker southeast corner of basement, with mostly 2x4 lumber used in its construction, and observed a cache of weapons and ammunition. This was observed thru a small opening of that locker. The citizen, being familiar with weapons having served in the

Defendant contends on appeal that the District Court improperly denied his motion to suppress the evidence and material listed in the indictment after he attempted to indicate the insufficiency of the complaint for the search warrant. In support of his argument, defendant alleges under the guidelines of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1967) that the complaint for the search warrant herein was insufficient to provide "a neutral and detached magistrate"[3] with the requisite probable cause basis for the warrant to issue and furthermore, the complainant failed to allege or make a showing with respect to the reliability of the unidentified citizen-informant providing the police officer with the pertinent information.

Even if the decision of *Jones* v. *United States*, 362 U.S. 257 (1960) which gives great deference to a magistrate's determination of probable cause is ignored, we are convinced the complaint for warrant was factually sufficient to form a probable cause basis for the warrant to issue. The locker containing the arms and the distinct varieties of arms viewed by the citizen were described with great particularity evincing personal observation. Furthermore, with knowledge of weapons gleaned from the Armed Forces, the citizen was able to list the types of weapons he witnessed inside the locker for police, believing them to be illegally stored or possessed.

United States Army and working in Ordnance while he was in the service, knew what the weapons were. The building was pointed out by the citizen and a diagram, showing the location of the locker in the basement, was made out by the citizen and given to the reporting Investigator."

3. Johnson v. United States, 333 U.S. 10, 14 (1948).

We turn to the question raised by defendant of the omission of an allegation in the complaint for the warrant concerning the reliability of the informant, which defendant considers fatal to the validity of said warrant.

The exactions of the complaint for a search warrant under the Fourth Amendment are propounded by the Supreme Court in *Aguilar, supra,* and later considered in *Spinelli, supra.* Under *Aguilar, supra,* a complaint when based solely on hearsay information from an unidentified informant must recite ". . . some of the underlying circumstances from which the officer concluded the informant . . . was 'credible' or his information 'reliable'." (378 U.S. at 114).

With these stringent requirements as precedent, the Supreme Court considered a reversal of a conviction by the Sixth Circuit where the question concerned the sufficiency of an affidavit upon which a warrant had issued, *United States* v. *Harris,* 412 F. 2d 796 (6 Cir., 1969). Although the Sixth Circuit determined that the first prong of the Aguilar test had been satisfied, Harris' conviction was reversed in that the affidavit for the warrant did not contain a basis for establishing the informant's credibility. The Supreme Court then reversed the holding of the Sixth Circuit, (403 U.S. 573), finding that the affidavit in question contained an "ample factual basis for believing the informant which, when coupled with the affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant." (403 U.S. 579-580).

Thus, while adhering in general to the *Aguilar, supra,* decision, the Supreme Court clearly indicated the burden of satisfying the so-called second prong of *Aguilar* was not as stringent as *Spinelli* had indicated. The Supreme

Court suggested a more flexible approach to examine probable cause affidavits.

In the case at bar, obvious from the face of the complaint is the fact that the *Aguilar* requirement of an allegation of reliability has been omitted from the wording of the complaint, thereby failing to explicitly attest to the veracity of the informant. Nonetheless, the wording of the complaint sets forth with specificity the facts and circumstances which gave credence to belief that a crime was being committed or criminal activity was evidenced from personal observation. See *Spinelli, supra,* 393 U.S. at 416. The question then must be asked whether "the internal content of the affidavit intrinsically proves the truth of the . . . citizen's word." *United States* v. *Roman,* 451 F. 2d 579, 581 (4 Cir., 1971), and whether this is sufficient to satisfy the reliability standard of Aguilar.

From the face of the complaint, evident is the fact that the citizen was familiar with the premises in question and was possessed with intimate knowledge of the exact location and contents of the locker in question. The allegations of the complainant are not self-serving nor does it appear that the accusations by the citizen were reported to the police merely to spite defendant Unger.[4]

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4. Various federal and state courts have distinguished the government informant considered in Aguilar and Spinelli from the eyewitness, victim of a crime or a citizen who provides information of a crime. These courts while not overruling the guidelines of Aguilar, have dispensed with specific allegations of reliability or past reliable contract with the informant, and inferred that reliability may be deduced from the content of the complaint. The rationale of these holdings is that the concomitant danger of self-interest does not inure to a victim

The Complaint emphasizes the very circumstances from which the magistrate herein could determine that the information given by the citizen was "credible or the infromant was "reliable".

We are of the opinion that the reliability of the citizen's tip is further underwritten by his knowledge of the weapons viewed in the locker and the specificity with which he reported its contents to the police. In addition the citizen pointed out the house where the weapons were stored thereby leaving no chance for error when the search was effected. He also penned a detailed map of the premises indicating the exact location and description of the basement locker. With the apartment building identified to him and with the aforementioned quantum of information in his possession, Detective Vollick applied for the search warrant in question. Furthermore, a police officer's own knowledge of the potential or actual crime and the corroborating evidence of the informant's tip within his knowledge, must be considered as well as his own assessment of the reliability of his source of information. *United States* v. *Harris, supra.*

We recognize that the opinion of the police officer or agent applying for the warrant as to the reliability of the citizen informant is alone insufficient for the issuance of a warrant without allegations thereto in the complaint. But here, the information supplied in the complaint attested to its own integrity by the specificity with which it was stated attesting to an independent reliability and

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or witness to a crime as easily as it would to a government informant. See Brown v. United States, 365 F. 2d 976 (D.C. Cir., 1966); Young v. United States, 435 F. 2d 405 (D.C. Cir., 1970); United States v. James, 452 F. 2d 1375 (D.C. Cir., 1971); United States v. Roman, supra; People v. Hoffman, 45 Ill. 2d 221, 258 N.E. 2d 326 (1970).

when coupled wth the officer's corroboration of the location of the apartment building and his occasion to question the citizen, reliability was established under *United States* v. *Harris, supra.*

We therefore hold the complaint for the warrant herein was sufficient under the guidelines of *Aguilar* and *Spinelli* as interpreted by *Harris* and the motion to suppress was properly denied by the District Court.

The defendant raises one further attack on the sufficiency of the warrant on appeal; that the complaint does not indicate on its face that the information supplied by the citizen was timely.

We agree with the statement of the government that the weapons which had been observed complete with appropriate ammunition had a devastating destructive capacity; that the citizen informant who was familiar with weapons by virtue of his military experience would be likely to act upon his discovery with a degree of immediacy.

Furthermore, the complaint for the warrant in the case at bar includes rhetoric which would indicate that the included events and observations had occurred recently, which is significant when determining whether probable cause existed at the time the warrant issued. The complaint stated that the officer "has probable cause to believe" that the items to be seized "are now located" at the place in question. We believe the recitation of these facts in the present tense[5] as well as the potential

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5. See Stone v. United States, 390 U.S. 204 (1968) (" . . . the use of the present tense" indicates that information was supplied close to the time of the affidavit); Rider v. United States, 355 F. 2d 192 (5 Cir., 1966); United States v. Slapo, 285 F. Supp. 513 (S.D.N.Y. 1963).

for harm which would inspire expedient disclosure to authorities attest to the timeliness of the complaint for the warrant. Cf. *Sgro* v. *United States,* 287 U.S. 206 (1932).

It is our view that the warrant in this case was properly issued and that the evidence seized pursuant to the warrant was properly admitted in the trial.

The judgment of conviction is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
January 2, 1973

Before

Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Myron L. Gordon, District Judge

No. 72-1149

United States of America,
Plaintiff-Appellee

v.

Herman P. Unger, Jr.,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED that the petition for rehearing filed in this appeal be and the same is hereby DENIED.

APPENDIX C

Matthew J. Danaher
Clerk of Court

State of Illinois }
County of Cook } ss.

The Circuit Court of Cook County

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT

On this day Investigator Monroe J. Vollick #10442, Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search Herman Unger and basement locker at south east corner of building 5426 & 26 N. Ashland Chicago, Cook, Illinois, and seize a cache of weapons, including machine guns, machine guns with tripods, rifles, rocket launchers, cases of ammunition for the above weapons, all in violation of the Illinois Revised Statutes relating to Unlawful Use of Weapons as defined in the Illinois Revised Statutes which have been used in the commission of or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register.

I further command that a return of anything so seized shall Judge Branch 44, 2600 S. California, Chicago, Ill., or before any court of competent jurisdiction.

.....
Judge

Time and date of issuance .....
Matthew J. Danaher, Clerk of the Circuit Court of Cook County

....
(Court Branch) (Court Date)

State of Illinois }
County of Cook } ss.

The Circuit Court of Cook County

COMPLAINT FOR SEARCH WARRANT

Investigator Monroe J. Vollick #10442 complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of Herman Unger and locker in basement at 5424 and 26 N. Ashland, Chicago, Ill., location of locker S/E corner of basement, and seize the following instruments, articles and things: a cache of weapons including machine guns, machine guns with tripods, a rocket launcher, automatic and semi-automatic rifles, and ammunition for the above weapons, which have been used in the commission of, or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above: The Complainant, a police offi-

cer for the City of Chicago, presently assigned to Robbery Investigations from the 6th Area located at 3801 N. Damen Ave. The officer was contacted by a citizen, who had occasion to be in the basement located at 5424 & 26 N. Ashland while working at his occupation, saw in an enclosed locker in that basement, located of locker south east corner of basement, with mostly 2x4 lumber used in its construction and observed a cache of weapons and ammunition. This was observed thru a small opening of that locker. The citizen, being familiar with weapons having served in the United States Army and working in Ordnance while he was in the service, knew what the weapons were. The building was pointed out by the citizen and a diagram, showing the location of the locker in the basement, was made out by the citizen and given to the reporting Investigator.

/s/ Monroe J. Vollick #10442
Complainant

Subscribed and sworn to before me on December 20, 1970

.....

CCMC-1-219 NEW

MATTHEW J. DANAHER, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

(Court Branch) (Court Date)

STATE OF ILLINOIS)
COUNTY OF COOK) ss. THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

Investigator Monroe J. Vollick #10442 complainant

now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of [redacted] and HORACE UNGAR

locker in basement at 5924 Nor 26 W. Addison, location of locker S/C corner of basement, Chicago, Ill. (Premises, City and State)

and seize the following instruments, articles and things: ~~a cache of weapons~~ including machine guns, machine guns with tripods, a rocket launcher, semi-automatic autoratic and semitic rifles, and weapo ammunition for the above weapons.

which have been used in the commission of, or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

The complainant, a police officer for the City of Chicago, presently assigned to Robbery Investigations from the 6th Area located at 3801 N. Damen Ave. The officer was contacted by a citizen, who had occassion to be in the basement located at 5924 N. 26th W. Addison while working at his occupation, saw in an enclosed locker in that basement, location of locker SOUTH EAST CORNER OF BASEMENT, WITH METAL DOOR LOCKED USING THE ~~NUMBERED~~. and observed a cache of weapons and ammunition. This was observed thru a small opening of that locker. The citizen, in being familiar with weapons having served in the United States Army and working in Ordinance while he was in the service, knew what the weapons were. The building was pointed out by the citizen and a diagram, showing the location of the locker in the basement, was made out by the citizen and given to the reporting Investigator.

Jno Monroe J. Vollick #10442
Complainant

Subscribed and sworn to before me on December 20 1971

Judge

MATTHEW J. DANAHER
Clerk of Court

CCMC-1-220

STATE OF ILLINOIS }
COUNTY OF COOK } ss. THE CIRCUIT COURT OF COOK COUNTY

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT

CHANGED TO EXHIBIT NO. 17

On this day Investigator Monroe J. Vollick #10442, Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search ~~Defendants~~ HERMAN UNGER (PERSON)
and South East corner of Lumbard Basement locker #5429 + 26 N. Ashland (PREMISES) Chicago, Cook, Illinois, (CITY AND STATE)
and seize a cache of weapons, including machine guns, machine guns with tripods, rifles, rocket launchers, cases of ammunition for the above weapons, all in violation of the Illinois Revised Statutes relating to Unlawful Use of Weapons as defined in the Illinois Revised Statutes. (INSTRUMENTS, ARTICLES, AND THINGS)

which have been used in the commission of or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register

I further command that a return of anything so seized shall be made without unnecessary delay before me or be fore Judge Branch 44, 2600 S. California, Chicago, Ill., or before any court of competent jurisdiction.

JUDGE

Time and date of issuance

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1063

HERMAN P. UNGER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing unregistered firearms, machine guns, rifles, pistols, and hand grenades in violation of 26 U.S.C. 5861(a) and fined $500. The court of appeals affirmed (Pet. App. A).

Petitioner contends that the affidavit for the search warrant, pursuant to which the police discovered and seized the unregistered firearms, was insufficient. The affidavit is set forth at Pet. App. 13-14 n. 2. Petitioner's contention was fully answered in the lengthy opinion of the court below, upon which we rely (Pet. App. 11-19).[1]

[1]As to petitioner's suggestion that the decision below on the question of the timeliness of the information conflicts with *Rosencranz* v. *United States*, 356 F. 2d 310 (C.A. 1), and *United States* v. *Boyd*, 422 F. 2d 791 (C.A. 6), we note that the information there—that an informant had detected the odor of fermenting mash on the defendant's property—did not carry the strong implication of immediacy and urgency inherent in the information concerning the dangerous weapons involved here. See Pet. App. 18-19.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.